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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1943

No. 934

THE EMPORIUM CAPWELL COMPANY
(a corporation),

Petitioner,

vs.

CLIFFORD C. ANGLIM,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
AND SUPPORTING BRIEF.

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Subject Index

	Petition for Writ	Page
Opinions Below		3
Jurisdiction		3
Statement		3
Questions Presented		6
Reasons for Allowance of Writ.....		7

Brief in Support of Petition

Point I—The transfer was exempt from tax under Treasury Regulations 71, Article 35(r).....	11
Point II—The transfer was also exempt from tax under Treasury Regulations 71, Article 35(e).....	15
Conclusion	20

Appendix

Statutes of California	i
Statutes of Delaware	iii
United States Internal Revenue Code.....	iv
Treasury Regulations 71, Article 35.....	v

Table of Authorities Cited

Cases	Pages
City Bank Farmers Trust Co. v. Hoey, 125 Fed. (2d) 577..	8
Emporium Capwell Company, The, v. Anglim, 48 Fed. Supp. 292	3
Emporium Capwell Company, The, v. Anglim, 140 Fed. (2d) 224	3
Helvering v. Reynolds Tobacco Co., 306 U. S. 110, 115....	19
Koppers Coal & Transportation Co. v. U. S., 107 Fed. (2d) 706	8
Mastin v. Mastin, 99 Fed. 435.....	15
Niagara Hudson Power Co. v. Hoey, 117 Fed. (2d) 414...	8
State Street Trust Co. v. Hassett, 134 Fed. (2d) 156.....	8
U. S. v. Merchants Nat. Trust & Savings Bank, 101 Fed. (2d) 399	7, 8
U. S. v. Seattle First Nat. Bank, 136 Fed. (2d) 676....	7, 8, 12, 13
U. S. v. Seattle First Nat. Bank, decided March 27, 1944, 88 U. S. Supr. Ct. Law. Ed. Adv. Op. 593.....	7
Weil v. U. S., 115 Fed. (2d) 999.....	8
Statutes	
Civil Code of California, Sec. 361(1).....	14
Civil Code of California, Sec. 361(5).....	14
Delaware Corp. Law, Sec. 59 (Revised Code of Del. 1935, Chap. 65, §§2091, 2092).....	4
National Banking Act, Sec. 3 (12 U. S. C. Sec. 34a).....	13
Treasury Regulations 71, Art. 35, subd. (d).....	18, 19
Treasury Regulations 71, Art. 35, subd. (e).....	
.....	2, 9, 15, 16, 17, 18, 19, 20
Treasury Regulations 71, Art. 35, subd. (r).....	2, 7, 11
Treasury Regulations 71, Sec. 113.34.....	19
U. S. C. A. Title 28, §347.....	3

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*To the Honorable Harlan Fiske Stone, Chief Justice of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United States:*

Your petitioner, The Emporium Capwell Company, a California corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment entered in the above-entitled cause on January 24, 1944, affirming a judgment of the United States District Court for the

Northern District of California, Southern Division, entered on January 15, 1943.

The action was brought by your petitioner in the District Court to recover the sum of \$16,514.12 paid by your petitioner to Clifford C. Anglim as Collector of Internal Revenue at San Francisco, California, together with interest. The sum in controversy had been assessed by the Commissioner of Internal Revenue as a tax against the plaintiff for an alleged documentary stamp tax on the transfer in the course of, and as a part of, a statutory merger, of 412,853 shares of the common stock of your petitioner to the former shareholders of The Emporium Capwell Corporation, a Delaware corporation, which had, prior to the merger, owned and held said common shares of your petitioner.

Your petitioner contends, as it contended in both courts below, that the so-called transfer was exempt from taxation by reason of either or both of two regulations in force at the time of the transaction in question, i.e., Regulation 71, Article 35(r), as a transfer "wholly by operation of law", and Regulation 71, Article 35(e), as a "transfer of stock of a merged corporation in exchange for stock of a merging corporation at the time, and as part, of a statutory merger".*

*In the Appendix we include by quotation or summary the relevant portions of the statutes of California and of Delaware providing for the merger of corporations, and of the applicable provisions of the Internal Revenue Code and of the Treasury Regulations involved.

OPINIONS BELOW.

The opinion of the District Court is reported at 48 Fed. Supp. 292. It also appears at R. 77.

The opinion of the Circuit Court of Appeals is reported at 140 Fed. (2d) 224. It also appears at R. 103.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered on January 24, 1944 (R. 112). A petition for rehearing was seasonably filed on February 17, 1944, and was denied on March 1, 1944 (R. 113; 137 Fed. (2d) 224). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, §347).

STATEMENT.

The facts, as found by the trial court (R. 84), are undisputed. Every material allegation of the complaint (R. 2) was either admitted by the answer (R. 69) or was agreed upon by the written "Stipulation as to Certain Facts" (R. 70).

Prior to, and at the time of the merger here involved, plaintiff taxpayer, The Emporium Capwell Company (hereinafter called "California corporation") was a corporation organized under the laws of California.

The Emporium Capwell Corporation (hereinafter called "Delaware corporation") was a corporation organized under the laws of Delaware.

In 1939 the California corporation had outstanding, in addition to issues of 7% preferred and 4½% preference stock, 412,853 shares of common stock without par value. All of this common stock of California corporation was owned and held by Delaware corporation, which had issued and outstanding, in the hands of the public, 412,853 shares of its own capital stock without par value. The California corporation (taxpayer and petitioner) and the Delaware corporation, under date of September 20, 1939, made and entered into an agreement of merger and took the other steps provided in the laws of the respective states of incorporation (Civil Code of California, §361; Revised Code of Delaware 1935, Chapter 65, §§2091, 2092) to accomplish a merger of the two corporations, to become effective on the 31st day of January, 1940. The laws of both states provided that in order to effect a merger an agreement of merger must be approved by a majority of the Board of Directors of each corporation and by at least two-thirds of all of the stockholders of each. Under each statute the merger becomes effective when the agreement, accompanied by proper acknowledgments and certificates, is filed with the Secretary of State of each of the states.

The agreement of merger (R. 8) provided that the two corporations "shall merge and be merged into a single corporation" (R. 11); "that said single corporation shall be The Emporium Capwell Company" (the California corporation) (R. 11); that the merger "shall operate to extinguish all the issued capital stock of The Emporium Capwell Corporation" (the Delaware corporation); that "the 412,853 shares of such stock held by holders other

than The Emporium Capwell Corporation shall, by such merger, be extinguished, and such merger shall effect the transfer, from The Emporium Capwell Corporation to the holders of the said 412,853 shares of its capital stock proportionately, of all the issued and outstanding common stock of The Emporium Capwell Company, being 412,853 shares without par value, all presently held by The Emporium Capwell Corporation" (R. 12). The agreement goes on to provide (R. 13-14) that the mode of carrying the terms and provisions of the merger into effect and the manner and basis of converting the shares, etc. of The Emporium Capwell Company shall be as follows:

"(a) After the merger herein provided for shall have become effective, the outstanding shares of the capital stock of The Emporium Capwell Corporation will, by the terms of such merger hereinabove set forth, have been extinguished, and each of the holders of record of such shares (other than The Emporium Capwell Corporation itself) will, by the terms of such merger, have become the owner of a like number of shares of the common stock of The Emporium Capwell Company, transferred to such holder from The Emporium Capwell Corporation."

On June 10, 1941 the Commissioner of Internal Revenue assessed a tax of \$16,514.12 against your petitioner (California corporation) and the respondent, as Collector, made demand upon the California corporation for the payment of said sum as a documentary stamp tax under the Internal Revenue Code on the transfer of said 412,853 shares of the common stock of the California corporation to the former shareholders of said Delaware corporation as a part of the statutory merger (R. 6). In accordance

with said demand, and to avoid further penalties for non-payment, your petitioner, on June 14, 1941, paid said sum of \$16,514.12 to the respondent Collector (R. 6-7). On July 2, 1941 your petitioner duly filed with the Commissioner of Internal Revenue a claim for refund of said sum of \$16,514.12; on the 12th day of November, 1941, said Commissioner rejected said claim and mailed to petitioner a notice of the disallowance of said claim (R. 7). The present action was brought to recover said sum claimed to have been illegally assessed and collected.

The District Court entered judgment that the plaintiff take nothing and that the defendant have judgment for costs (R. 89).

On appeal by the plaintiff, the Circuit Court of Appeals entered judgment affirming the judgment of the District Court (R. 112).

QUESTIONS PRESENTED.

Where a Delaware corporation and a California corporation entered into a merger agreement under the statutes of both states providing for such merger, and the merger agreement, effective January 31, 1940, provided that the Delaware corporation should, upon the merger, cease to exist, and that the California corporation (taxpayer) should survive, and further provided that the merger should operate to extinguish all the capital stock of the Delaware corporation (which owned all the common stock of the California corporation), and that, by the merger, the prior owners of the capital stock of the

Delaware corporation would become the owners of a like number of shares of the common stock of the California corporation:

1. Were the transfers of shares of common stock of the California corporation to former holders of the extinguished capital stock of the Delaware corporation transfers which resulted "wholly by operation of law" and therefore exempt from transfer tax under Regulation 71, Article 35, subdivision (r)?

2. Were the transfers of shares of the common stock of the California corporation to former holders of the extinguished capital stock of the Delaware corporation "transfers of the stock of the merged corporation in exchange for stock of the merging corporation at the time, and as a part, of a statutory merger", and therefore exempt from transfer tax under Regulation 71, Article 35, subdivision (e), in effect at the time of the merger?

REASONS FOR ALLOWANCE OF WRIT.

1. In holding that the transfer was not exempt under Reg. 71, Art. 35(r) as a transfer "wholly by operation of law", the lower court rendered a decision in conflict with its own earlier decisions¹ and in conflict with a later decision of this Court.²

¹*U. S. v. Merchants Nat. Trust & Savings Bank*, 101 Fed. (2d) 399;

U. S. v. Seattle First Nat. Bank, 136 Fed. (2d) 676.

²*U. S. v. Seattle First Nat. Bank*, decided March 27, 1944, 88 U. S. Supr. Ct., Law. Ed. Adv. Op. 593 (not yet officially reported).

Before the lower court decided this case, there had been a divergence between the decisions in the Ninth Circuit³ and decisions in other Circuit Courts of Appeals.⁴ Courts of Appeals in other Circuits had interpreted the words "wholly by operation of law" in subdivision (r) as excluding from the exemption any transfer accomplished by a statutory merger or consolidation in which the voluntary action of the two or more corporations involved, or of their directors and stockholders, had played any part. The court below had taken a contrary view in the two cases decided by it. In the instant case, the court below followed the views of the other Circuit Courts of Appeals, departing from its earlier decisions in the *Merchants National etc. Bank* and *Seattle First National Bank* cases, and undertook to distinguish these cases on grounds which, it is respectfully submitted, are untenable.

Even more important is the fact that, after the decision of this case in the lower court, this Court, which had granted certiorari in the *Seattle First National Bank* case, decided that case on March 27, 1944,⁵ and, in so doing, interpreted subdivision (r) in a manner contrary to the decisions in Circuits other than the Ninth, in accord with the earlier decisions of the Ninth Circuit, and contrary to the decision in the instant case, in which the lower court had departed from its earlier holdings.

³See cases cited in note 1 supra.

⁴*Koppers Coal & Transportation Co. v. U. S.*, 107 Fed. (2d) 706; *Weil v. U. S.*, 115 Fed. (2d) 999; *Niagara Hudson Power Co. v. Hoey*, 117 Fed. (2d) 414; *City Bank Farmers Trust Co. v. Hoey*, 125 Fed. (2d) 577; *State Street Trust Co. v. Hassett*, 134 Fed. (2d) 156.

⁵Cited in note 2, supra.

The writ should be granted:

(a) Because of confusion in various decisions of the different Circuit Courts of Appeals and conflict between decisions in the Circuit Court of Appeals for the Ninth Circuit and decisions of other Circuit Courts of Appeals.

(b) Because of conflict between different decisions of the Circuit Court of Appeals for the Ninth Circuit.

(c) Because the lower court has, in this case, decided a question of federal law in a way in conflict with an applicable decision of this Court.

2. In holding that the transfer was not exempt, under Reg. 71, Art. 35, (e), as a transfer of stock in exchange for other stock at the time and as part of a statutory merger, the lower court has decided an important question of federal law which has not been, but should be, settled by this Court.

Since the regulations have the force of law, it is important to both taxpayers and the government that the meaning and effect of such regulations be correctly and authoritatively determined.

For reasons which will appear fully in the brief accompanying this petition, we submit that the lower court gave Reg. 71, Art. 35, (e) an interpretation directly contrary to its true meaning and effect.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and

determination, a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its docket as No. 10,423, The Emporium Capwell Company, a corporation, Appellant v. Clifford C. Anglim, Appellee, to the end that said cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals entered January 24, 1944 be reversed by this Court, and that petitioner be granted such other and further relief as to this Court may seem proper.

Dated, San Francisco, California,

April 19, 1944.

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